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No. 1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF WILLIAMSPORT, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION OF PENN CENTRAL COMPANY TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, Penn Central Company, formerly The Pennsylvania Railroad Company, an intervening appellee, moves that the judgment of the District Court be affirmed on the ground that the question raised by appellants is so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal, filed March 4, 1968, from a judgment of a statutory three-judge District Court, refusing to enjoin, annul, or set aside orders of the Interstate

Commerce Commission entered May 3 and July 6, 1967, in Finance Docket No. 24398, *The Pennsylvania Railroad Company, Discontinuance of Trains 570 and 571 between Buffalo, New York and Baltimore, Maryland.* The reports and orders of the Commission were both by its Division 3. As yet, they have not been printed. They are attached to appellants' Jurisdictional Statement as Appendices C and D.

The proceedings before the Commission, from which the instant appeal arises, involved notices of the Railroad under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. 13a(1). These notices, posted and filed on December 7, 1966, proposed to discontinue Pennsylvania Railroad passenger trains 570 and 571, operating between Buffalo, N. Y. and Baltimore, Md., effective January 15, 1967.

Section 13a(1) of the Interstate Commerce Act, 49 U.S.C., § 13a(1) was originally part of the Transportation Act of 1958.[1] This legislation resulted from the concern of the Congress about the financial plight of railroads and particularly the losses resulting from the operation of passenger trains. See 104 Cong. Rec. 10842, 10843, 10851-10854 (1958).

This section gives railroads the right to discontinue interstate passenger trains by serving a notice and supporting statement upon the Commission. Notices also must be posted in trains and in the stations involved. Further, the notices must be served upon the Governors and regulatory agencies of each state having jurisdiction over transportation, and upon representatives of the Post Office and Railway Labor. These procedures were followed in the instant case.

Prior to the expiration of the 30-days' notice, the Commission, in accordance with the statute, suspended the effective date of the notice for the maximum period of four months. Thereafter, hearings were held in Harrisburg,

1. 72 Stat. 568-574.

Williamsport, Olean, Buffalo and Washington, D.C. Later, on May 3, 1967, the Commission entered an order permitting the Railroad to discontinue passenger trains 570 and 571 between Buffalo and Harrisburg, but requiring the continued operation of those trains between Harrisburg and Baltimore.

A Complaint and Petition for a Temporary Restraining Order was then filed, on behalf of certain individuals, communities and organizations, with the United States District Court for the Middle District of Pennsylvania. A Temporary Restraining Order was entered by that court prohibiting the Railroad from discontinuing the trains between Buffalo and Harrisburg until such time as the plaintiffs (appellants here) had petitioned the Commission for reconsideration.[2] By order dated July 6, 1967, the Commission, through its Division 3, denied the petitions for reconsideration and affirmed its earlier order of May 3, 1967.

On August 2, 1967, the court below heard argument on appellants' request for an interlocutory injunction or temporary restraining order applicable to the Commission's final order of July 6, 1967. By a *per curiam* order filed August 3, 1967, the court below held irreparable damage had not been established and therefore the Commission's order should not be further stayed. The passenger trains were discontinued on August 4, 1967.

Thereafter, argument was heard on the merits. The appellants contended that if a railroad seeks to discontinue passenger trains over their entire run and so states in its notice, the Commission is without power to grant a partial discontinuance. It was their position that the only choice open to the Commission is to grant or deny the entire discontinuance.

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2. This order remained in effect until August 3, 1967. City of Williamsport v. United States, 273 F. Supp. 899 (M.D. Pa. 1967).

After recognizing that the principal issue was whether the Commission had the power "to require operation of both trains in part from Baltimore to Harrisburg, thus allowing discontinuance of the remaining portion between Harrisburg and Buffalo," the court below concluded that there is nothing in the statute or in its legislative history suggesting the limitation which the appellants advanced. The court below also concluded that the Commission had not departed from the requirements of the law or abused its discretion in entering the orders which were the subject of the appeal. Therefore, the court below, without dissent, dismissed the complaint.

In their Jurisdictional Statement, the appellants request this Court to note probable jurisdiction and assign the matter for oral argument.

THE STATUTE INVOLVED

The issue before this Court involves an interpretation of Section 13a(1) of the Interstate Commerce Act. The appellants have printed this section in the Appendix to their Jurisdictional Statement.

ARGUMENT IN SUPPORT OF MOTION

The questions raised by the appellants here all relate to one basic issue: whether or not the Commission has the power under Section 13a(1) of the Act, to permit a railroad to discontinue passenger trains over a portion of their runs, when the notices filed and posted propose a discontinuance over their entire runs. Appellants contend the Commission may only consider the notice as filed and therefore must either permit or deny the entire discontinuance sought. This argument was rejected by the Commission, and the court below concluded that it is not in accord with the statute. It is submitted that a fair reading of the relevant statutory provision demonstrates that both the Commission and the court below were correct.

The statute gives to a railroad the right to notify the Commission and the public of its intention to discontinue a train "in whole or in part." After the Commission has considered: the notice, the railroad's statement in support of the discontinuance and any protests filed, the statute gives it the power to institute an investigation of the proposed discontinuance "in whole or in part," and to require the portion placed under investigation to be continued, *i.e.*, stayed, for four months beyond the noticed discontinuance date. Finally, after the investigation is concluded, the statute specifically authorizes the Commission to permit the discontinuance "in whole or in part," or to require the train or a portion thereof to be continued for one year.

There was good reason for the Congress to include the phrase "in whole or in part" three times in the statute. Many passenger trains operate over routes which extend beyond a thousand miles. The character of the trains and the areas they serve vary widely over such long routes. It may be that while there is no need for service

over the entire route, service is still required between local points. Similarly, the service needs between various couplets of cities along the route may be quite different from the requirements between the terminals.

The initiation of passenger service discontinuances is given to railroad management, and upon its appraisal of the circumstances, a determination is made as to whether a particular service should be discontinued "in whole or in part." Having reached its determination, the railroad submits its proposal to the Commission for approval. But the statute makes it plain that the Commission is not given the limited function of merely placing its imprimatur upon the railroad's proposal, or rejecting it. Rather, the Commission, after a preliminary review of the matter, including the protests of objectors, may approve it or may place the whole or a part of the railroad's proposal under investigation for further scrutiny. This, of course, is a sound procedure since it gives recognition to the varying service needs that are covered by the long-haul passenger trains. If nobody objects to the discontinuance, except between limited points along the route, and the Commission is convinced, by the railroad's supporting statement, that the discontinuance is manifestly proper—except for the portion to which objection has been taken—the dispute is narrowed. Therefore, only the portion of the service to which question exists is made the subject of hearing.

At the hearing, the issues are whether "public convenience and necessity" require the continuance of the service in dispute, and whether such continuance would "unduly burden interstate . . . commerce." In view of these statutory standards, it is obvious that the evidence submitted at the hearing may justify a discontinuance of part of the service under investigation and require that another part be continued; or the evidence may justify the discontinuance or continuance of all of such service. Because of this, the Com-

mission is given the power to require the continuance of the particular passenger service for one year "in whole or in part."

In summary, the three times inclusion of the phrase "in whole or in part" in the statute evidences a Congressional intent that the Commission's power is flexible and its approval or disapproval of a proposed passenger train discontinuance can be tailored to the needs of the public for a part, or all, of the service, weighed against the railroad's burden in maintaining the operation. Of necessity, such flexibility is dependent upon the right of the Commission to grant all or a portion of the service discontinuance proposed by the railroad. To restrict the Commission's power to the specific terms of the notice would utterly destroy the flexibility which is an inherent part of the pattern of regulation in this area.

The Commission has regularly and consistently interpreted Section 13a(1) of the Act in the same manner as it did here, and on several occasions has entered orders permitting the discontinuance of a passenger train over a portion of its route and requiring the continuance of service over another section.[3] An interpretation of a regulatory statute consistently followed by the administrative agency functioning under it, is entitled to great weight in the courts and should be followed except where clearly wrong—which is not so here.[4]

The other arguments in the Jurisdictional Statement also are basically related to the statutory interpretation issue. Appellants' contention that the Commission did not

3. Boston & Maine Corp. Discontinuance of Service, 324 I.C.C. 418 (1965); Chicago, M. St. P.&P.R. Co. Discontinuance of Service, 317 I.C.C. 691 (1961); Louisville & N.R. Co. Discontinuance of Service, 307 I.C.C. 173 (1959); New York Central R. Co. Discontinuance of Service, 307 I.C.C. 167 (1959).

4. See Power Reactor Co. v. Electricians, 367 U.S. 396, 408; County of Marin v. United States, 356 U.S. 412, 420.

make the necessary statutory findings is with reference to findings for the operation of the trains over their entire run. The Commission made separate findings applicable to the Buffalo-Harrisburg portion of the run, and separate findings applicable to the Harrisburg-Baltimore segment. Together, these findings constitute findings for the entire run of the trains. But because of the quite different character of the trains and the traffic handled over the two sections, the Commission of necessity had to make findings for the northern segment that differed completely from the findings which the facts compelled for the southern segment. Specifically, the Commission found that public convenience and necessity did *not* require the trains to be continued between Harrisburg and Buffalo, and that such continued operation would unduly burden interstate commerce. By contrast, the Commission specifically found that public convenience and necessity required the trains be continued between Baltimore and Harrisburg and that the continued operation would *not* unduly burden interstate commerce. Since, as the court below held, the facts supported these completely opposite findings of the Commission, if its order was to be supported by the findings of facts, it had to permit the discontinuance of the trains north of Harrisburg and require their continuance south of Harrisburg.[5]

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5. See Southern R. Co. v. North Carolina, 376 U.S. 93, 99-101. While admitting the Commission has power to allow the discontinuance of "so-called unprofitable trains," appellants infer in their Jurisdictional Statement that the discontinued trains are profitable. This is not true. The direct operating costs for trains 570 and 571 exceed the revenues they earn. This is so for the entire run, as well as any part of it. Appellants' arguments are based upon an accounting theory which adds to the revenues of the specific trains involved the earnings from the transportation of passengers, mail and express transported on connecting trains. The Commission considered this argument and found that even if the revenues from connecting trains were added to the earnings of the northern segment of trains 570 and 571, those trains would still be operated at a deficit. Jurisdictional Statement App. D at 38a.

This appeal is essentially concerned with a single issue of statutory interpretation. There is no ambiguity in the statute for it specifically confers upon the Commission power to permit proposed passenger train discontinuances in whole or in part. Since the Commission in this instance, as it has consistently done in the past, permitted a discontinuance of a part of a passenger service upon adequate findings of facts, satisfying the relevant statutory standards, this Court should grant the motion to affirm the judgment of the court below, which refused to set aside or enjoin the Commission's order.

THE RELIEF REQUESTED

It is most respectfully submitted that the issue here is not of such substance or of such importance as to require further argument. The judgment of the District Court, therefore, should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, CARL HELMETAG, JR., one of the attorneys for Penn Central Company, an intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of June, 1968, I served copies of this Motion to Affirm on the several parties as follows: (1) on the United States by mailing copies thereof in a duly addressed envelope, with postage prepaid, to the Hon. Ramsey Clark, Attorney General of the United States, Department of Justice, Washington, D. C.; (2) on the United States by mailing copies in a duly addressed envelope, with postage prepaid, to the Hon. Erwin N. Griswold, The Solicitor General, Department of Justice, Washington, D. C.; (3) on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with postage prepaid, to Hon. Robert W. Ginnane, its General Counsel, at the Offices of the Commission, Washington, D. C.; (4) on the other parties by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

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